

JANUARY 28, 2005

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:10 a.m., on Friday, January 28, 2005, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Kim Lacey, Robin Shropshire, Bill Rossbach, Gayle Skunkcap, Jr. & Susan Kirby Brooke

Board Members Absent: Don Marble

Board Attorney(s) Present: Tom Bowe & Kelly O'Sullivan, Attorney General's Office, Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Laurie Crutcher

Department Personnel Present: Richard Oppen, Director; Tom Livers, Deputy Director; Tom Ellerhoff, Administrative Officer, Director's Office (DO); Lisa Peterson, DO; John North, Chief Legal Counsel, DO; Keith Jones, DO; Keith Christie, DO; Claudia Massman, DO; Jim Madden, DO; Norman Mullen, DO; David Rusoff, DO; Steve Welch, Administrator, Permitting & Compliance Division (PCD); Judy Hanson, PCD; David Klemp, Air Resources Management Bureau (ARMB), PCD; Debbie Skibicki, ARMB, PCD; Charles Homer, ARMB, PCD; Jan Brown, ARMB, PCD; Ed Thamke, Waste & Underground Tank Management Bureau (WUTMB), PCD; Bill Rule, WUTMB, PCD; Kari Smith, Water Protection Bureau (WPB), PCD; Tom Reid, WPB, PCD; Melee Valet, WPB, PCD; Gail Faber, WPB, PCD; Warren McCullough, Environmental Management Bureau (EMB), PCD; Tom Ring, EMB, PCD; Nancy Johnson, EMB, PCD; Art Compton, Administrator, Planning, Prevention & Assistance Division (PPAD); George Mathius, Water Quality Planning Bureau (WQPB), PPAD; Christian Levine, WQPB, PPAD; Robert Bukantis, WQPB, PPAD; Louise Moore, Air, Energy & Pollution Prevention Bureau, PPAD; David Bowers, Hazardous Waste Site Cleanup Bureau, Remediation Division (RD); John Koerth, Mine Waste Cleanup Bureau, RD; John Arrigo, Administrator, Enforcement Division

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): Don Quander, Holland & Hart; Harmon Ranney, Powder River Gas; Anne Hedges, Montana Environmental Information Center (MEIC); Dan Arthur, ALL Consulting; Jim Jensen, MEIC; Steve Wade, RMP; Dave Bockelmann, ALL Consulting; Bill Connors, Centennial/RMP; Darcy Neigum, Centennial; Rick Patzman, Centennial; Michele Reinhart, Northern Plains; Jennifer Hendricks, MEIC; Dave Simpson, Westmoreland Resources; Kevin Mathews, Bison Engineering; Ray Sheldon, Centennial/RMP; Gary Amestoy, Amestoy Consulting; Bud Clinch, Montana Coal Council; Bill Eggers, Crow Agency

I.A. Welcome new Board members and introduction.

Chairman Russell stated that Tom Ellerhoff was sitting in for Tom Livers and would serve as Board Liaison with DEQ during this meeting.

Chairman Russell introduced Richard Oppen, the new DEQ director, and provided a summary of Richard's educational and employment background.

Mr. Oppen welcomed the Board. He asked that they let two things guide their decision: the laws and the science. Mr. Oppen provided a brief overview of the agency for the benefit of the new Board members.

II.A. New Board member orientation.

Mr. North provided an overview of the Board's duties under Titles 75 and 82 of the Montana Code pertaining to rulemaking and contested cases. He spoke about some of the ongoing issues of the Board and provided the Board with a document that described under which statutes the Board has rulemaking authority and under which it hears contested cases. Mr. North said the Board is designated a quasi-judicial board and explained what that designation entailed. He said the Board is attached to the Department for administrative purposes, but that the Board exercises its authority independent of the Department. Mr. North provided details of the rulemaking process. A majority of the rules in Title 17 of the Administrative Rules of Montana were adopted by the Board.

Mr. North described the Open Meeting Law and the Public Participation Law, and explained how each of them impacts the Board. He talked about the Water Pollution Control Advisory Council, the Air Pollution Advisory Council and the Environmental Quality Council and explained how those councils impact the Board. He also talked about the Petroleum Tank Release Compensation Board.

Mr. North explained the Code of Ethics adopted by the Legislature. He provided a copy of a memo he prepared that describes the Code of Ethics.

Mr. North provided an overview of ongoing issues that come before the Board: Gallatin River Outstanding Resource Water (ORW) designation; temporary water quality standards for the New World Mining District and for the Upper Blackfoot Mining Complex; Total Maximum Daily Loads (TMDLs) for impaired or threatened waters; and Concentrated Animal Feeding Operations (CAFOs) and issues about permits and permit fees.

Ms. Peterson provided the Board with a brief tour of the Department's and Board's Websites, including the Frequently Asked Questions, or FAQs, section of the Board's Website. She also informed the Board that she sends out articles of interest to the Board members, such as articles on coal bed methane.

Mr. Ellerhoff welcomed the new Board members.

- I.B. | Review and approve minutes of the December 3, 2004, meeting.
- Ms. Lacey MOVED to approve the December 3, 2004, meeting minutes. Ms. Brooke SECONDED the motion. The motion CARRIED.
- II.B. | Contested case review.
- Mr. Bowe explained his role as attorney to the Board, as Standing Interim Hearing Examiner and Hearing Examiner for contested cases and as Presiding Officer in rulemakings. He referenced and discussed a document in the Board packet that summarized the contested case workload over the previous three years. He explained the contested case process. He gave examples of how Board members recused themselves when there was an appearance of a conflict of interest. He discussed the rule against ex parte contacts in contested cases. He explained the difference between quasi-judicial functions and quasi-legislative functions. He also talked about the Code of Ethics and the disclosure provisions of the law.
- Mr. Bowe explained that he was the attorney for the Board, not for the individual Board members.
- II.C.1.a | In the matter of M&W Investments, Inc.'s appeal of two subdivision application non-degradation decisions and a deviation request denial, EQ #01-1457 and #00-1822.
- Mr. Bowe indicated that the parties requested more time in order to finalize a settlement agreement, and that he had granted the request. He said it was possible that the Board would see an order of dismissal for approval at the April or June Meeting.
- II.C.1.b | In the matter of CR Kendall Corporation's appeal of DEQ's decision to deny a minor permit amendment, BER 2002-09 MM.
- Mr. Bowe explained that this is a case where the parties have requested extra time to submit a proposed schedule.
- II.C.1.c | In the matter of the Petition for Review of Hazardous Waste Final Permit No. MTHWP-03-01 issued to Flying J Petroleums, Inc., BER 2003-14 HW.
- Mr. Bowe explained that the file in this case involved about two inches of very technical paperwork regarding hazardous waste. He said he had granted a request of the parties to have more time to work out a settlement agreement.
- II.C.1.d | In the matter of violations of the Montana Underground Storage Tank Act at Big Sky Truck Stop, Dillon, BER 2004-07 UST.
- Mr. Bowe said the parties in the case had reached an agreement that contained a payment schedule for administrative penalties. He said he had suspended the contested case process. If the payments are made on schedule the case could be on the action agenda for dismissal at the next Board meeting.

- II.C.1.e In the matter of the request for hearing of Lang Creek Brewery, Inc., BER 2004-13 WQ.
- Mr. Bowe had nothing to add to the information provided on the agenda.
- II.C.1.f In the matter of violations of the Montana Water Quality Act by the City of Lewistown Wastewater Treatment Plant, BER 2004-15 WQ.
- Mr. Bowe had nothing to add to the information provided on the agenda.
- II.C.1.g In the matter of the request for hearing of Nature View Estates, BER 2004-16 SUB.
- Mr. Bowe had nothing to add to the information provided on the agenda.
- III.A.1 In the matter of the amendment of ARM 17.8.335.
- Mr. Homer explained that the Board had adopted ARM 17.8.335 in July of 2002 at the request of Columbia Falls Aluminum Company to address concerns they had while performing maintenance on the ducting system for their air pollution control equipment. The rule prohibited DEQ from taking enforcement action for violations that occurred during times when the air pollution control equipment was being bypassed for maintenance purposes. Mr. Homer said that in January of 2003, the rule was sent to the Environmental Protection Agency (EPA) for inclusion into the State Implementation Plan (SIP), which is a compilation of all the rules the Board has adopted to ensure compliance with ambient air quality standards. He explained that after a rule is sent to the EPA for inclusion in the SIP, and receives EPA approval, the rule is then published in the Federal Register, thereby becoming a federal rule and federally enforceable.
- Mr. Homer said that in October of 2003, the EPA proposed to disapprove the rule, stating that the rule would endanger the DEQ's ability to implement the Maximum Achievable Control Technology (MACT) Program. He said that upon review of EPA's comments, DEQ agreed that the rule could be read to endanger the department's ability to enforce the MACT standard for aluminum smelters and further endanger the department's ability to maintain delegation for the entire MACT Program.
- Mr. Homer said the DEQ presented a request to the Board in October 2004, which would amend ARM 17.8.335 by adding a statement that the exemption from enforcement does not apply to MACT standards. He said the amendment does not address all of EPA's concerns with the existing rule and that EPA has not taken final action on its proposal to disapprove the rule.
- Mr. Homer said the Board held a hearing on the amendment December 1, 2004. Tom Bowe was the Presiding Officer. There were no comments at the hearing, but the Board did receive two written comments: one from the EPA in support of the change and one from Columbia Falls Aluminum Company indicating it preferred the rule as it was, but that it intended to operate under the amended rule once adopted.
- Mr. Homer said the Department was requesting the Board adopt the amendment as proposed.

Chairman Russell called for public comment. There was no response.

Chairman Russell called for a motion to adopt the amendment to ARM 17.8.335, the presiding officer's report, the House Bill 521 and 311 analyses and the Department's responses to comments. Ms. Brooke so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.A.2 In the matter of the amendment of rules pertaining to linear facilities covered under the Major Facility Siting Act (MFSA).

Mr. Ring explained that the Major Facility Siting Act rules, as they pertain to linear facilities, had not been updated since 1985. He said there have been changes in legislation over the years and that the Department requested initiation of rulemaking to update the rules. He said the biggest change was removing the alternative siting study and baseline study from the rules and putting information into a separate circular in hopes of making the process more user friendly.

Mr. Ring said other changes that were made included changing the decision maker from the Board to the Department and changing from a two-stage process to a one-stage process.

Mr. Ring said a hearing was held and there were no comments at the hearing. He said there was one comment letter received and the Department responded to that comment. Mr. Ring said the Department urged the Board to make the rule changes and updates identified in the notice, and to adopt the new circular as well.

Mr. Rossbach questioned the trade secrets provision and how the public would know that certain information was considered privileged and held back.

Ms. Shropshire inquired about the siting of pipelines in respect to population.

Chairman Russell called for public comment. No one responded.

Chairman Russell called for a motion to amend and repeal rules pertaining to the Major Facility Siting Act, to include adoption of Circular MFSA-2, as amended; adopt the presiding officer's report, the House Bill 521 and 311 analyses, and the Department's responses to comments. Ms. Lacey so MOVED. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.B.1 In the matter of the request to initiate rulemaking to update the Air Quality Incorporation by Reference Rules at ARM 17.8.102 (annual update).

Mr. Homer explained that there are certain federal programs that the Department has gained delegation from the federal government to implement, many of which are contained in the Code of Federal Regulations. He said the Department incorporates them by reference in many areas, instead of repeating them in the Administrative Rules of Montana. He said the Code of Federal Regulations (CFR) changes every

year, so in ARM 17.8.102, a specific edition of the CFR is referenced and the Department comes before the Board annually to update the reference.

Mr. Homer said the Department was requesting initiation of rulemaking to incorporate by reference the 2004 edition of the CFR. He also said there were other references, including state references, which needed to be updated.

Ms. Shropshire initiated discussion regarding the Clean Air Mercury Rule. Mr. Homer explained that there is a time lag because, for example, the July 1, 2004, edition of the CFR contains rules adopted between July 1, 2003, and June 30, 2004. If EPA adopts a mercury rule, it could be in the July 1, 2005, edition of the CFR, and would be considered in next year's incorporation by reference rulemaking.

Chairman Russell asked if any member of the public would like to speak to the matter. There was no response.

Chairman Russell called for a motion to initiate the rulemaking, appoint Tom Bowe or another Agency Legal Services attorney to preside over the matter and to publish the MAR notice as submitted. Mr. Rossbach so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.C.1 In the matter of violations of the Montana Underground Storage Tank Act at Can-Am Convenience Store, Plentywood, BER 2004-03 UST.

Ms. O'Sullivan said she had conducted a hearing on October 26, 2004, and had issued the Findings of Fact, Conclusions of Law and Proposed Order on November 18. She said the parties notified her that they did not intend to contest the findings and conclusions, so she recommended the Board adopt her proposed decision as its final order.

Discussion took place regarding the \$750 proposed penalty and how Ms. O'Sullivan arrived at that number, and whether something could be done to prevent this kind of situation from happening again in the future. Ed Thamke, DEQ, said that the Bureau is improving document tracking and liaison with individuals with enforcement actions.

Chairman Russell called for a motion to authorize the Chair to sign the final order, which would adopt the Findings of Fact, Conclusions of Law and Proposed Order. Mr. Rossbach so MOVED. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.C.2 In the matter of violations of the Montana Underground Storage Tank Act at South's Country Store, Helena, BER 2004-17 UST.

Mr. Bowe explained that a hearing was never held for this case, because the parties resolved their differences and the owners withdrew their appeal. He said there was an order for the Chairman to sign that would approve the withdrawal of the appeal and close the contested case.

- Chairman Russell called for a motion to authorize the Chair to sign the order closing the contested case. Ms. Lacey so MOVED. Mr. Skunkcap SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.D.1 In the matter of MPDES General Permit No. MTR04000 for storm water discharge associated with small municipal separate storm water sewer system (MS4), BER 2004-18 WQ.
- Mr. Bowe said he had issued a prehearing order in December and a scheduling order in January. He said Butte-Silver Bow had submitted a motion to intervene and that DEQ did not oppose the motion, so he granted it. He said that one law firm was now representing the seven cities. He said he would be available to be the hearing examiner.
- Discussion took place regarding Board member attendance at hearings.
- Chairman Russell called for a motion to appoint Mr. Bowe as the permanent hearing examiner for this case. Ms. Brooke so MOVED. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.D.2 In the matter of violation of the Montana Strip and Underground Mine Reclamation Act by Westmoreland Resources, Inc. at the Absaloka Mine, BER 2005-01 SM.
- Mr. Bowe said that the attorneys involved in the case had proposed a schedule that included a hearing date sometime in June.
- Discussion took place regarding: the question of abatement and whether it would be delayed because of the appeal; tribal involvement and whether the Board could instruct Mr. Bowe to notify the tribes of the schedule and the deadline for intervention; and issues in contested cases and who decides what those issues are.
- Chairman Russell called for a motion to appoint Mr. Bowe the hearing examiner and to ensure that the tribes and all affected parties are apprised of the case. Mr. Rossbach so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.D.3 In the matter of the air quality permit granted to Rocky Mountain Power, Inc. for the Hardin Generation Project, Permit No. 3185-02, BER 2005-02, 03, 04 AQ.
- Mr. Bowe said the parties were in agreement to consolidate the cases. He said the parties were in disagreement: on who should hear the case, the Board or a hearing examiner; on the location of the hearing, Hardin or Helena; and on the Stay of the permit. He said the parties agreed to stipulate to dismissal of claims he had identified. He also noted that the schedule proposed by DEQ extends well beyond the Board's 120-day goal to hear air quality permit appeals.
- Mr. Eggers stated he had asked for a Stay of the permit, for a full Board hearing, and for the hearing to be conducted in Hardin. He said the location was not a major

issue for him; however, with regard to the request for Stay, he feared there would be a rush to complete construction before some of the major issues were covered.

Mr. Eggers expressed concern with having an attorney and a hearings examiner who would be the same person. Understanding that a hearings examiner exercises discretion, he asked that for this case the Board exercise its collective discretion.

Ms. Hendricks suggested that new Board members hearing contested cases directly in their early days could be beneficial to them. She said MEIC supports the request to have the hearing before the Board. She briefly discussed the request for Stay and said MEIC had no objection to it.

Mr. Wade clarified that construction of the power plant had already commenced under an existing permit – a permit that was not appealed. He said it is a modified permit that is being appealed. He said Rocky Mountain Power is advocating for a hearing examiner to hear the case due to the complexity of it. He said they do not believe a Stay should be issued.

Mr. Rusoff said the hearing could be lengthy and suggested the Board appoint a hearing examiner. He said a Helena hearing would be convenient for the DEQ, but that the Department did not have a strong position on the issue. Mr. Rusoff said the Department was not taking a position on the Stay.

Discussion took place regarding whether the Tribe was made aware of the discharge of mercury. Mr. Eggers stated that he does not represent the Tribe. Mr. Klemp, DEQ, said the Crow Tribe was sent the application and draft permit and final decision. Public meetings were held at Crow Agency and Hardin.

Mr. Rossbach MOVED to have the Board hear the contested case. Ms. Shropshire SECONDED the motion. Discussion commenced regarding the length of time the hearing could take and whether it should be held in Hardin or Helena. Also discussed was the possibility of the Tribe joining the contested case. It was discussed that if the Board heard the case, the hearing would be limited to two days. Chairman Russell called for a vote on the motion for the Board to hear the case. The motion CARRIED with a 5-1 VOTE.

Chairman Russell called for a motion to appoint Tom Bowe hearing examiner for the prehearing management of the case. Mr. Rossbach so MOVED. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Discussion took place regarding scheduling, which lead to discussion regarding the request for stay of the permit. It was determined that Mr. Bowe would handle the stay issue as part of the prehearing management.

Mr. Rossbach MOVED that the hearing be conducted in Helena. Ms. Shropshire SECONDED the motion. The Board discussed the matter and it was clarified that the public would not be allowed to speak at the hearing, unless one was called as a

witness by one of the parties. Chairman Russell called for a vote on the motion to conduct the hearing in Helena. The motion CARRIED with a 4-2 VOTE.

IV. General public comment

Chairman Russell opened the floor for public comment. No one responded.

Board members introduced themselves and provided information regarding their professional backgrounds.

V. Adjournment

Chairman Russell called for a motion to adjourn. Ms. Lacey so MOVED. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

The meeting adjourned at 1:25 p.m.

Board of Environmental Review January 28, 2005, minutes approved:

JOSEPH W. RUSSELL, M.P.H.
CHAIRMAN
BOARD OF ENVIRONMENTAL REVIEW

DATE